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No. 1400

In the

Supreme Court of the United States

OCTOBER TERM, 1970

THE FIRST NATIONAL BANK OF WAUKEGAN as Trustee under Trust No. 616, JOSEPH J. DROBNICK and MARK J. DROBNICK,

Petitioners,

vs.

FOSS PARK DISTRICT, a Body Corporate and Politic,

Respondent-Condemnor.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, SECOND DISTRICT

JOSEPH J. DROBNICK, *pro se*
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The Scheffer Press, Inc., 118 South Clinton Street, Chicago, Illinois

INDEX TO BRIEF

	PAGE
Citation to Opinion below	1
Jurisdiction	2
Questions Presented	3
Statutes Involved	4
Statement of Facts	5
Reasons for Granting the Writ	6
Conclusion	8

AUTHORITIES

CASES

Griffen v. The People of the State of Illinois, 351 U.S. 12, 76 Sup. Ct. Reporter 585 ..... 2, 7, 8

Williams v. Oklahoma, 89 Sup. Ct. 1818 (1969) 2, 7, 8

STATUTES

Chapter 105, Section 8-1 of the Illinois Revised Statutes of 1969, Section 8-1(b) 2, 3

Chapter 105 of the Illinois Revised Statutes of 1969, Section 9.1-5 ..... 3, 4, 7

Chapter 105 of the Illinois Revised Statutes of 1969, Section 8-1(h) 3

INDEX TO APPENDIX

Opinion of the Appellate Court of Illinois, 2nd District 5a

Statutes Involved 1a, 2a, 3a, 4a, 5a

Order of the Supreme Court of Illinois denying Petition for Leave to Appeal 11a

Order of the Supreme Court of Illinois staying the Mandate 13a

Certificate of the Clerk of the Supreme Court of Illinois 14a

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No.

THE FIRST NATIONAL BANK OF WAUKEGAN as Trustee under Trust No. 616, JOSEPH J. DROBNICK and MARK J. DROBNICK,

Petitioners,

vs.

FOSS PARK DISTRICT, a Body Corporate and Politic,

Respondent-Condemnor.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, SECOND DISTRICT

Petitioners, The First National Bank of Waukegan as Trustee under Trust No. 616, Joseph J. Drobnick and Mark Drobnick pray that a writ of certiorari issue to review the judgment and decision of the Illinois Appellate Court, Second District.

OPINIONS BELOW

The opinion of the Illinois Appellate Court, Second District is reported in full in 125 Ill. App. 2nd 276 and is appended to the Appendix A in full in this petition. A timely petition was filed with the Illinois Supreme Court requesting leave to appeal, but such a petition was denied; with-

out opinion (see Appendix B). The mandate was stayed pending disposition of the Appellants' Petition for Writ of Certiorari to the United States Supreme Court (Appendix C).

JURISDICTION

The judgment and decision of the Illinois Appellate Court was entered July 6th, 1970, and the Petition for Rehearing which was filed in due time, was denied July 30th, 1970: A timely petition for leave to appeal was filed with the Supreme Court and was denied December 2nd, 1970.

The jurisdiction of this Court is invoked under U. S. C. A. 28 U. S. C. A. 1331 as the matter arises under the Constitution and the laws of the U. S. and the amount in question exceeds the sum of $10,000.00.

The jurisdiction of this Court is further invoked under the United States Supreme Court Rule 19(a). And the cases that sustain jurisdiction are *Williams* v. *Oklahoma,* 89 Sup. Ct. 1818 (1969) and *Griffen* v. *The People of the State of Illinois,* 351 U. S. 12, 76 Sp. Ct. Reporter 585.

The Illinois State Statutes that are involved are as follows:

Illinois Revised Statutes Chapter 105, Section 8-1, provides in part:

> Every park district shall . . . have and exercise the following powers:
> (b) acquire . . . by condemnation under the Eminent Domain Act, any and all real estate. . . .

and Section 8-10 provides in part:

> All park Districts shall have the power to plan, establish and maintain . . . golf . . . courses.

Section 9.1-5 of Chapter 105 of the Illinois Revised Statutes of 1969 in part reads:

> Each Park District shall issue Bonds . . . and shall charge for the use thereof at a rate which at all times is sufficient to pay the maintenance and operation costs, depreciation and principal and interest.

Section 8-1(h) reads:

> To establish fees for the use of the facilities of the districts. Fees chargeable non-residents of such district need not be the same as fees charged to the residents of the district.

CONSTITUTIONAL QUESTIONS

(1) Is the Statute (Chapter 105, Section 8-1) which attempts to grant power to establish and maintain a golf course an unconstitutional exercise of the legislative power as being in violation of Article 2, Section 2 of the State Constitution of Illinois and in violation of Section 1 of the 14th Amendment of the U. S. Constitution?

(2) Is the Statute an unconstitutional denial of equal protection of the law in violation of Section 1 of the 14th Amendment of the U. S. Constitution and Article 2, Section 2 of the Illinois State Constitution?

(3) Is the taxation of real estate in the Foss Park District for the purpose of acquisition, construction and maintenance of a golf course the taking of the residents' property without due process of law and hence in violation of Article 2 of Section 2 of the Illinois State Constitution and in violation of Section 1 of the 14th Amendment to the U. S. Constitution?

Illinois Revised Statutes 1969, Chapter 105, pars 8-1(b), 8-10, 9-1-5.

CONSTITUTIONAL PROVISIONS

The only constitutional provisions involved are the 14th Amendment of the U. S. Constitution and Article 2 of Section 2 of the Illinois State Constitution.

Article 14, Section 1 of the U. S. Constitution:

a. Nor shall any state deprive any person of life or liberty or property without due process of law.

b. No state shall deny to any person within its jurisdiction the equal protection of the law.

Article 2, Section 2 of the Illinois State Constitution:

a. No person shall be deprived of his life, liberty or property without due process of law.

Section 9.1-5 of Chapter 105 of the Illinois Revised Statutes of 1969, page 1193, reads:

> "Each Park District shall issue Bonds . . . and shall charge for the use thereof at a rate which at all times is sufficient to pay the maintenance and operation costs, depreciation, and *the principal and interest on the bonds.*"

The legal issues were raised by a Traverse (C 57, 58). The Trial Court denied allegation No. 2 of the Traverse and struck down allegation 6 of the Traverse. And the Appellate Court of Illinois 2nd District affirmed the Trial Court (Page 1 of the Record, page 3 of the Petition for Leave to Appeal).

FACTS

The Foss Park District and the City of North Chicago for all practical purposes have approximately the same boundary. It is a small city with about 4000 single family units.

The Foss Park District has been levying and collecting taxes for the past 12 years and had set aside the money for the purpose of land acquisition, construction and maintenance of a golf course. Use of the facility is given to only such people who can afford and do pay the fee for playing on the golf links.

The action in the lower Court was one in eminent domain to take 41 parcels of land described as city lots. It has taken these lots for the purpose of construction and operation of a golf course.

REASONS FOR GRANTING THE WRIT

The statutes on Eminent Domain and the constitution of the State of Illinois allow to condemn for a proper public purpose. The creation, establishment and maintenance of a golf course is not a proper public purpose because the course is made for a few of the upper echelons of our society. Only a select few play a golf course.

It is improper and unfair to tax all of the working classes in the Foss Park District to acquire land, build, maintain and operate a golf course from tax funds obtained by levying on the small home owners and the low working classes and the same to be used by the upper echelons of our society. But the upper echelons are but a few select group of people. Many out-of-district residents would come to use the golf course. The expense of its operation would be charged against the 4000 single family units of the local factory working residents.

To-day our courts are beginning to realize the taxing power of government is being excessively used so that 40% of all income is being taken from the people by one form of taxation or another. So the courts are now scrutinizing the source, method and manner of expenditure of tax revenue more and more closely and carefully.

The statute which attempts to grant power to establish, operate and maintain a golf course is an unconstitutional exercise of legislative power because it deprives the citizens of the Foss Park District of their property without due process of law.

The purpose of taxation is to supply the people of the State with governmental functions such as fire, police pro-

tection and education. These things are essential to sustain the health, safety and welfare of our community. It is not intended that luxury shall be charged to the taxing powers of government. The playing of golf is a pure luxury. The fees would not maintain the golf course. Additional real estate tax revenue would be needed year after year to maintain and operate this golf course. It is improper to use Tax Revenue for the construction, maintenance and operation of a golf course. (9.1-5 Chapter 105 Ill. Rev. Statutes.)

There is also a denial of the equal protection of the law under the U. S. Constitution. Article 1, Section 14 of the U. S. Constitution says:

> "No State shall deny to any person within its jurisdiction the equal protection of the laws".

If the Park Board were to follow 9.1-5 of Chapter 105 page 1193 of the Illinois Revised Statutes of 1969, then the fund for the acquisition of land and the construction of the golf course would come from the *revenue of the Golf Course and not from taxation on Real Estate,*

> "Each Park District shall issue Bonds . . . and facilities shall charge for the use thereof at a rate which at all times is sufficient to pay maintenance and operation costs, *depreciation, and the principal and interest on the bonds*".

Factory working residents of the Foss Park District (almost all of the residents of the Foss Park District work in factories) can't afford to play golf and can't afford to pay fees for the use of a golf course. The result is that only those who can afford to pay fees would be able to play golf. In *Williams* v. *Oklahoma,* 89 Sup. Ct. 1818 (1969) and in *Griffen* v. *the People of the State of*

Illinois, 351 U. S. 12, 76 Sup. Ct. Reporter 585 (1956). It was necessary for the State to provide a free transcript to a criminal, otherwise there is a violation of the Equal Protection Clause of the 14th Amendment to the U. S. Constitution and the Due Process Clause of the U. S. Constitution. Certainly if a criminal is entitled to the protection of the equal protection clause, then a bona fide resident and citizen of the Foss Park District is also entitled to the protection of the equal protection clause of the U. S. Constitution. Citizens of the Foss Park District are entitled to the equal protection of the law.

The *McNiel* v. *Chicago Park District* case, (401 Ill. Sup. 556), did not involve the issue of violation of the equal protection of the laws and is therefore not applicable and not in point.

CONCLUSION

For the foregoing reasons it is respectfully requested that this petition for Writ of Certiorari be granted.

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APPENDIX A

Park Dist. Code § 8-1
Sec.

Article amended by act approved May 17, 1951. L.1951, p. 113.

8—1. General corporate powers.] § 8—1. Every park district shall, from the time of its organization, be a body corporate and politic by such name as set forth in the petition for its organization or such name as it may adopt under Section 8—8 hereof and shall have and exercise the following powers:

(a) To adopt a corporate seal and alter the same at pleasure; to sue and be sued; to contract in furtherance of any of its corporate purposes;

(b) To acquire by gift, devise, grant or purchase, or by condemnation under the Eminent Domain Act, any and all real estate, or rights therein necessary for building, laying out, extending, adorning and maintaining any such parks, boulevards and driveways, or for effecting any of the powers or purposes granted under this code as its board may deem proper, whether such lands be located within or without such district; provided, however, that no park district shall have any power of condemnation under the Eminent Domain Act or otherwise as to any real estate, lands, riparian rights or estate, or other property situated outside of such district, but shall only have power to acquire the same by gift, devise, grant or purchase, and such district shall have the same control of and power over lands so acquired without the district

as over parks, boulevards and driveways within such district.

(c) To acquire by gift, bequest or purchase any personal property necessary for its corporate purposes provided that all contracts for supplies, materials or work involving an expenditure in excess of $2,500 shall be let to the lowest responsible bidder, after due advertisement, excepting contracts which by their nature are not adapted to award by competitive bidding, such as contracts for the services of individuals possessing a high degree of professional skill where the ability or fitness of the individual plays an important part, contracts for the printing of finance committee reports and departmental reports, contracts for the printing or engraving of bonds, tax warrants and other evidences of indebtedness, contracts for utility services such as water, light, heat, telephone or telegraph and contracts for the purchase of magazines, books, periodicals, pamphlets and reports and excepting where funds are expended in an emergency and such emergency expenditure is approved by ¾ of the members of the board;

(d) To pass all necessary ordinances, rules and regulations for the proper management and conduct of the business of the board and district and to establish by ordinance all needful rules and regulations for the government and protection of parks, boulevards and driveways and other property under its jurisdiction, and to effect the objects for which such districts are formed.

(e) To prescribe such fines and penalities for the violation of ordinances as it shall deem proper not exceeding $200 for any one offense, which fines and penalties may be recovered by suit in the name of such district before the circuit court for the county in which such violation occurred. The procedure in such suits shall be the same as that provided by law for like suits for the violation of ordinances in cities organized under the general laws

of this State, and offenders may be imprisoned for non-payment of fines and costs in the same manner as in such cities. All fines when collected shall be paid into the treasury of such district;

(f) To manage and control all officers and property of such districts and to provide for joint ownership with one or more cities, villages or incorporated towns of real and personal property used for park purposes by one or more park districts. In case of joint ownership, the terms of the agreement shall be fair, just and equitable to all parties and shall be set forth in a written agreement entered into by the corporate authorities of each participating district, city, village or incorporated town.

(g) To secure grants and loans, or either, from the United States Government, or any agency or agencies thereof, for financing the acquisition or purchase of any and all real estate, or rights therein, or for effecting any of the powers or purposes granted under this Code as its Board may deem proper.

(h) To establish fees for the use of facilities of the districts. Fees charged non-residents of such district need not be the same as fees charged to residents of the district. As amended by act approved Sept. 7, 1967. L.1967, p. 3952.

8—10. Recreational programs and other special powers.] § 8—10. All park districts shall have power to plan, establish and maintain recreational programs, provide musical concerts, to construct, equip and maintain airports, landing fields for aircraft, armories, field houses, gymnasiums, assembly rooms, comfort stations, indoor and outdoor swimming pools, wading pools, bathing beaches, bath houses, locker rooms, boating basins, boat houses, lagoons, skating rinks, piers, conservatories for the propagation of flowers, shrubs, and other plants, animal and bird houses and enclosures, athletic fields with seating stands, golf, tennis, and other courses, courts, and grounds, and the

power to make and enforce reasonable rules, regulations, and charges therefor. The express enumeration of each of the foregoing recreational facilities and equipment which park districts are herein given the power to provide shall not be construed as a limitation upon said park districts, nor prohibit any park district from providing any other facilities or equipment which may be appropriate for park purposes in any park of said district, nor shall the same in any way be held to limit the power and authority conferred upon park districts under other sections of this code. As amended by act approved May 17, 1951. L.1951, p. 113.

9.1—5 Charges for use of golf course—Rules and regulations—Payment of bonds—Accounts—Audit.] § 9.1—5. Each park district which issues bonds and acquires or constructs, or extends or improves a golf course and facilities shall charge for the use thereof at a rate which at all times is sufficient to pay maintenance and operation costs, depreciation, and the principal and interest on the bonds. Such district may make, enact, and enforce all needful rules and regulations for the construction, acquisition, improvement, extension, management, maintenance, care and protection of its golf course and for the use thereof. Charges or rates for the use of the golf course or courses shall be such as the board may from time to time determine.

While any bond issued under Section 9.1—1 of this Article is outstanding such district is required to maintain and operate its golf course or courses, as long as it can do so, out of the revenue derived from the operation thereof. It shall not sell, lease, loan, mortgage, or in any other manner dispose of the golf course or courses until all of the bonds so issued have been paid in full, both principal and interest, or until provision has been made for the payment of all of the bonds and interest thereon in full.

Such a park district shall install and maintain a proper system of accounts, showing the amount of revenue received from the operation of its golf course. At least once each year, the district shall have the accounts properly audited. A report of this audit shall be open for public inspection at all times. As amended by act approved March 31, 1965. L.1965, p. 239. Emergency. Effective March 31, 1965.

[125 Ill. App. 2d at 276]

MR. PRESIDING JUSTICE DAVIS DELIVERED THE OPINION OF THE COURT:

This is an eminent domain proceeding brought by the Foss Park District, seeking condemnation of certain lands for use as part of a public golf course in which the jury awarded the respondents $75,202.

On appeal, the respondents contend that the statute authorizing the petitioner to condemn for golf course purposes, where a fee for playing is to be charged, is unconstitutional; and that the trial court made certain erroneous evidentiary rulings.

The Park District Code grants unto park districts the power to condemn pursuant to the provisions of the Eminent Domain Act, to establish and maintain golf courses, and to establish fees for the use of the facilities of the park district. Ill. Rev. Stat. 1969, ch. 105, pars. 8—1(b), 8—10, 8—1(h). The respondents urge that this statutory power constitutes an unconstitutional denial of property without due process and without equal protection of the laws, in violation of Section 1, Amendment XIV of the United States Constitution, and of Article II of the Constitution of the State of Illinois. They contend that—since fees are to be charged for use of the golf course, and only those who can afford such fees may use the facility—*the use of tax funds to acquire land for such purpose is unconstitutional.*

The respondents have cited no authority for their rather novel argument, and we have found none. Even before there was specific statutory authority for a park district to charge fees for the use of its facilities, our courts had recognized its right to do so. *MacNeil* v. *Chicago Park Dist.*, 401 Ill. 556, 563, 564 (1948).

The constitutional questions raised by the respondents are not so substantial that we are precluded from deciding them. *Pettigrew* v. *National Accounts System, Inc.*, 67 Ill. App. 2d 344, 346, 347 (1966); *Supreme Court Rule 302(a)*, (Ill. Rev. Stat. 1969, ch. 110A, par. 302(a)). We find no taint on the constitutionality of the statutory authorization to charge a fee for the use of a public facility because public funds are to be used to acquire land on which the public facility is to be located. Consequently, the respondents' traverse was properly denied.

It is further contended by the respondents that the petitioner's expert witnesses based their opinions of value on negative factors, e.g. the lack of transportation, shopping, sewer and water, etc. in the area. These witnesses were qualified to give an opinion of value; their background, experience, and knowledge of the area qualified them to testify. The trial court has a wide discretion in determining the qualifications of an expert witness. *Trustees of Schools* v. *Schroeder*, 23 Ill. 2d 74, 78 (1961). The testimony of the petitioner's expert witnesses demonstrated that they considered the factors normally relevant to proving market value, including negative as well as positive elements. Their testimony, considered in its totality rather than in its fragmentation, substantiates that their respective opinions were based upon proper factors. See: *Forest Preserve Dist.* v. *Harris T. & S. Bank*, 108 Ill. App. 2d 65, 72 (1969).

The court limited the cross-examination of the petitioner's expert witnesses by preventing counsel from asking whether each witness would have valued the land in question differently had he known that all forty-one parcels were under common ownership. The court held that

there was no evidentiary foundation for such hypothetical cross-examination. However, the court indicated it would permit such examination as to those parcels which the respondents would establish were under common ownership. The respondents did not attempt to establish the common ownership by evidence, and the court's ruling was proper under the circumstances.

Likewise, the court properly denied cross-examination of these same witnesses, as to whether in arriving at their market value determination, they had considered the probability of rezoning. The court held that the evidence of such probability was inadequate to permit its suggestion before the jury, by counsel.

The respondents also sought to introduce evidence as to the possibility of bringing sewer and water into the area, its cost, and resulting advantage. However, such evidence necessitated assuming that the other lots in the area, including those not owned by the respondents, were a part of the possible improvement project. The court was of the opinion that the possibility of such cooperative project was too speculative for consideration.

In the cases cited by the respondents, the cost of improving subdivisions was admitted into evidence where agricultural land was valued as having a highest and best use for subdivision purposes. The courts there permitted testimony as to the cost of improvements since this would be a factor in determining the present market value of the agricultural land; its value as subdivision land must, of necessity, include consideration of the cost of converting the land to such use. See: *Forest Preserve District* v. *Krol*, 12 Ill. 2d 139, 145, 146 (1957).

The respondents also contend that the trial court erred in refusing to permit one of their witnesses to testify as an expert. On December 10, 1968, the court ordered each party litigant to provide the other with copies of all appraisal reports. On April 30, 1969, Simon was placed on the stand, presumably as the respondents' last of three

expert witnesses. The petitioner had not received an appraisal report from this witness. The respondents' prior expert witnesses had all testified as to the highest and best use of the land, and based their opinions of value on its single-family use. This witness then stated that he was of the opinion that the highest and best use of the land was for a planned unit development. Counsel for the respondents had previously advised the court and counsel for the petitioner that the witness would testify that the highest and best use was for single-family residential use.

Out of the presence of the jury, this witness testified that he had been contacted to make his appraisal approximately three months prior to the trial, and that he had not made any written report—his only report being oral. The oral report was made to the owner who had retained the witness, approximately two and one-half months prior to the trial. The witness purportedly had reported that his conclusion was that the highest and best use of the land was for multiple family dwellings.

Of the respondents' three expert witnesses, this was the second whose report had not been revealed to opposing counsel. The prior witness had submitted a written report, but even this was not furnished to the petitioner or its counsel. The court concluded that the respondents had wilfully and deliberately refused to comply with the court's order to produce the appraisal reports. Under the circumstances, this conclusion appears warranted, and the court's refusal to permit the respondents' last witness to testify was not an improper sanction to be imposed against them. Supreme Court Rule 219(c)(iv), (Ill. Rev. Stat. 1969, ch. 110A, par. 219(c)(iv)).

The respondents' main thrust in this appeal is alleged errors in the evidentiary rulings. The trial court must be permitted an area of discretion both as to the scope of cross-examination and as to the relevancy of evidence offered to prove a case in chief. Our purpose is not to ascertain that the record is free from all error, but to

determine that a just conclusion has been reached, founded upon competent and sufficient evidence, without error that might be prejudicial to a litigant's rights. *Ziegler* v. *Smith,* 86 Ill. App. 2d 215, 224 (1967).

The verdict of the jury was within the range of the testimony. The jury viewed the premises, and we cannot find that their verdict was the result of passion or prejudice or that there had been a clear and palpable mistake. Accordingly, the judgment of the trial court should be affirmed. *Trustees of Schools* v. *Schroeder,* supra, 79.

JUDGMENT AFFIRMED.

MORAN and SEIDENFELD, *JJ.* concur.

UNITED STATES OF AMERICA

State of Illinois, }
Appellate Court, } ss.
Second District. }

I, Howard K. Kellett, Clerk of the Appellate Court, in and for said Second Judicial District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true, full and complete copy of the Opinion of the said Appellate Court in the above entitled cause of record in my said office.

In Testimony Whereof, I have set my hand and affixed the seal of the said Appellate Court, in Elgin, in said State, this 6th day of July A.D. 1970.

/s/ Howard K. Kellett
Clerk Appellate Court,
Second Judicial District

APPENDIX B

(Record 3)

UNITED STATES OF AMERICA

State of Illinois } ss.
Supreme Court }

At a term of the Supreme Court, begun and held in Springfield, on Monday, the ninth day of November in the year of our Lord, one thousand nine hundred and seventy, within and for the State of Illinois.

Present: Robert C. Underwood, Chief Justice

Justice Walter V. Schaefer
Justice Thomas E. Kluczynski

Justice Daniel P. Ward
Justice John T. Culbertson, Jr.

Justice Caswell J. Crebs
Justice Marvin F. Burt

William J. Scott, Attorney General
Robert G. Miley, Marshal
Attest: Justin Taft, Clerk

Be It Remembered, that, to-wit: on the 2nd day of December 1970, the same being one of the days of the term of Court aforesaid, the following proceedings were, by said court, had and entered of record, to-wit:

Foss Park District, a body corporate and politic, Respondent No. 43550 vs. The First National Bank of Waukegan, as Trustee, under Trust No. 616, Petitioner	Petition for Leave to Appeal from Appellate Court Second District 69-212

And now on this day the Court having duly considered the Petition for Leave to Appeal herein and being now fully advised of and concerning the premises, doth overrule the prayer of the petition and denies Leave to Appeal herein.

And it is further considered by the Court that the said Respondent recover of and from the said Petitioner costs by it in this behalf expended, to be taxed, in due course of administration.

I, Justin Taft, Clerk of the Supreme Court of the State of Illinois and keeper of the records, files and Seal thereof, do hereby certify that the foregoing is a true copy of the final order of the said Supreme Court in the above entitled cause of record in my office.

In Witness Whereof, I have hereunto subscribed my name and affixed the Seal of said court this .....day of ....., 19.....

Clerk,
Supreme Court of the State of Illinois.

(Record 3)

APPENDIX C

IN THE SUPREME COURT OF ILLINOIS

December 17, 1970.

No. 43550

FOSS PARK DISTRICT a Body Corporate and Politic Plaintiff-Appellee Respondent vs. THE FIRST NATIONAL BANK OF WAUKEGAN as Trustee under Trust No. 616 Defendants-Appellants Petitioner	No. 43550

MOTION

Now comes MARK DROBNICK attorney for The First National Bank of Waukegan as Trustee under Trust No. 616 and represents unto this Court that he will file in due time a Petition for Writ of Certiorari in the Supreme Court of the United States with appropriate Record and fees necessary, and therefore

Moves this Honorable Court to Stay the Mandate pending disposition pending the disposition of the Petition for Writ of Certiorari.

/s/ Mark Drobnick
Mark Drobnick
Lawyer
415 Madison St.
Waukegan, Illinois.
De 6-9045.

IN THE SUPREME COURT OF ILLINOIS

IN VACATION AFTER THE NOVEMBER 1970 TERM

Foss Park District, a body corporate and politic, Plaintiff-Appellee, Respondent, vs. The First National Bank of Waukegan, as Trustee under Trust No. 616, Defendants-Appellants, Petitioner.	No. 43550

ORDER

This cause coming on to be heard on the motion of the appellant to stay the mandate pending disposition of appellant's Petition for Writ of Certiorari to the United States Supreme Court; due notice having been given and the court being fully advised in the premise;

IT IS ORDERED that the mandate be and is hereby stayed pending disposition of appellant's Petition for Writ of Certiorari to the United States Supreme Court.

ENTER:
/s/ Daniel P. Ward
Justice of the Supreme Court of Illinois

DATE: Dec. 31 - 70

(Record 4)

(Record 5)

UNITED STATES OF AMERICA

State of Illinois }
Supreme Court } ss.

I, JUSTIN TAFT, Clerk of the Supreme Court of the State of Illinois, and keeper of the records, files and Seal thereof, do hereby certify the foregoing to be a true copy of the record of this Court in a certain cause entitled:

Foss Park District, a body corporate and politic,
Respondent

No. 43550 vs.

The First National Bank of Waukegan, as Trustee, under Trust No. 616,
Petitioner

Petition for Leave to Appeal from Appellate Court Second District 69 - 212

filed in this office on the 3rd day of September A.D. 1970.

In Witness Whereof, I have hereunto subscribed my name and affixed the Seal of said court this 29th day of January 1971.

/s/ Justin Taft, Clerk,
Supreme Court of the State of Illinois

(Record 5)

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SUPREME COURT, U.S.

Supreme Court, U.S.
FILED
MAR 25 1971
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970.

No. 1400

THE FIRST NATIONAL BANK OF WAUKEGAN AS TRUSTEE UNDER TRUST No. 616, JOSEPH J. DROBNICK AND MARK J. DROBNICK,

Petitioners.

vs.

FOSS PARK DISTRICT, A BODY CORPORATE AND POLITIC,

Respondent-Condemnor.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970.

No. 1400.

THE FIRST NATIONAL BANK OF WAUKEGAN AS TRUSTEE UNDER TRUST No. 616, JOSEPH J. DROBNICK AND MARK J. DROBNICK,

Petitioners,

vs.

FOSS PARK DISTRICT, A BODY CORPORATE AND POLITIC,

Respondent-Condemnor.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

The Respondent, Foss Park District, urges that the Petition for Writ of Certiorari be denied for the reasons hereinafter set forth.

I.

JURISDICTION OF THIS COURT.

Petitioner invokes the jurisdiction of this court upon the basis of 28 U. S. C. A. 1331. This provision of law has no application to the jurisdiction of the Supreme Court of the United States and relates only to the original jurisdiction of the District Courts. This court should not take jurisdiction of this matter under the provisions of Rule 19(a) for the reason that no federal question of substance has been decided in the state court and for additional

reasons arising out of the nature of the case, status of Petitioners, condition of the record, and nature of the remedy.

II.

NATURE OF THE CASE.

This litigation arose as a routine eminent domain proceeding whereby Foss Park District, a municipal corporation organized under the law of Illinois, sought to condemn certain real estate owned by Petitioners for the purpose of providing park facilities to be developed as a golf course. Among the questions raised by the traverse filed by Petitioners was:

> "That the statute purporting to authorize the establishment of a golf course and paying for the same out of public funds is an unconstitutional exercise of the legislative power in that said statute, in permitting fees to be charged for the use of public facilities, deprives taxpayers of the free and equal use of such facilities, thereby depriving them of property without due process of law and depriving them of equal protection of the laws under the State and U. S. Constitution."

There were no allegations or proof in the Trial Court that Petitioners were taxpayers within the Foss Park District; that they were persons who did or did not wish to play the game of golf; that any fee schedule had been established by Foss Park District as a condition of playing golf; or that the financial resources of Petitioners were such that they would have been unable to pay a reasonable fee for playing the game of golf.

The Trial Court struck the allegation challenging the constitutionality of the statute under which the Park District was exercising the power of eminent domain. The Appellate Court of the State of Illinois made the express

determination that the constitutional questions raised by Petitioners were not substantial. (Petition, p. 6a) While the Civil Appeals Rules of the Supreme Court of Illinois require that "Appeals from the final judgment of Circuit Courts shall be taken directly to the Supreme Court . . . (2) in cases involving a question of arising under the Constitution of the United States or of this state, . . ." Petitioners chose to take their appeal to the Appellate Court of Illinois, 2d District, which indicates initially that Petitioners themselves did not regard the constitutional question which they raised as one of substance. The Appellate Court in Illinois does not have jurisdiction to decide constitutional questions unless they involve "principles which are no longer fairly debatable, and consequently, not susceptible of being parlayed into substantial constitutional questions." *First National Bank and Trust Company* v. *City of Evanston,* 30 Ill. 2d 479, 197 N. E. 2d 705, *Pettigrew* v. *National Accounts System, Inc.,* 67 Ill. App. 2d 344.

The Supreme Court of Illinois apparently agreed with the Appellate Court that no substantial constitutional question was involved under either the Constitution of Illinois or of the United States for it declined to exercise its discretionary jurisdiction in this matter. In making this determination the Supreme Court of Illinois follows the same criteria as the Supreme Court of the United States. In *First National Bank and Trust Company* v. *Evanston,* 30 Ill. 2d 479, the Supreme Court of Illinois stated:

> "In view of the clear purpose of the new judicial article to curtail the mandatory jurisdiction of this court upon direct appeal, the interpretation that has been applied by the Supreme Court of the United States to the phrase in the exercise of its appellate jurisdiction is, however, relevant. That court has developed the concept of a 'substantial' constitutional question as a criterion of its jurisdiction under this phrase."

III.

ADDITIONAL REASONS FOR DENYING CERTIORARI.

1. The Status of Petitioners.

Petitioners are before the court as landowners in an eminent domain proceeding objecting to the constitutionality of Chapter 105 of Ill. Rev. Stats., 1969, apparently in two capacities (a) as taxpayers and (b) as guardians of unidentified persons composing a class which they characterize as the "low working class" (p. 6 of Petition) who might not be able to play the game of golf because the statute contemplates that fees might be charged for the use of the public golf course. At the outset we point out that these two positions are basically inconsistent in that insofar as the cost of the acquisition, operation and maintenance of the golf course is discharged by a fee paid by the users then Petitioners as taxpayers would be benefited rather than harmed. On the other hand, insofar as Petitioners seeks to protect the interests of the "low working class" who might be unable to pay the fee then this particular class is assisted or aided to the extent that taxpayers defray a part of the cost of acquiring, operating or maintaining of the facilities.

We point out that nothing in the allegations in the pleadings or in the evidence in the record indicates that Petitioners are members of either class whose protection they have undertaken. If the land which they hold in the Park District is condemned and they no longer own it then such land is no longer taxable in their hands and therefore they can not be adversely affected by taxes levied in the Park District to pay for the costs of acquiring, operating or maintaining the golf course. There are no allegations and is no evidence in the record that Petitioners own any land or are residents of or pay any taxes levied by Foss Park District.

Certainly there are no allegations or evidence that Petitioners are members of a "low working class" who can not afford to pay any kind of a fee (of which there is no evidence) which might be imposed for the use of the facilities. It is obvious that Petitioner, The First National Bank of Waukegan as Trustee under Trust Number 616, is neither indigent nor a golf player. The record does not show whether either Joseph Drobnick or Mark Drobnick are golf players and it certainly does not show anything with respect to their financial disability to pay a reasonable fee for a public service. The fact is that this record indicates that they received a judgment in their favor in the amount of $75,202 for their land. This would seem to militate against the conclusion that they were members of the "low working class" and could not afford to pay a fee to play golf.

It is well established that before a party may complain of the denial of the equal protection of the laws or that he has been denied due process of law he must bring himself within the injured class or make some showing that such a denial has affected him. (*U. S.* v. *Raines*, 362 U. S. 17, 4 L. Ed. 2d 524, 80 S. Ct. 519).

2. This Matter Is Not in a Posture for Decision of Question Presented.

As previously pointed out there is nothing in this record to inform this court with respect to the factors relating to the general use of public golf course, the fees which are charged for such use and the nature of the need of such facilities in the community and the type of use made of such facilities. Even assuming that the question raised is of sufficient significance to require the attention of this court the nature of this litigation and the record before this court is wholly inadequate for any kind of a determination to be made.

3. Nature of Remedy.

Even assuming that Petitioners were the proper parties to raise the due process and equal protection question and that the record was in such a condition that a reasoned and informed decision could be rendered with respect to such issues it would appear obvious that the remedy for the problem would be of no avail to these Petitioners. Even if it is for some reason or another deemed to be a denial of equal protection to charge any citizen a fee for the use of a public facility when he does not have sufficient money to pay, the proper remedy is not to deny a park district the power to acquire land for such purpose but rather it is to make some special arrangement or some modification of the fee schedule which would result in a special consideration for such class of people. Thus in *Griffin* v. *Illinois,* relied upon by Petitioners, the Supreme Court did not hold that the statutory proceedings for the review of criminal convictions in Illinois was unconstitutional but rather simply held that the State of Illinois must find in some manner, through court rule or otherwise, a means of providing a transcript for indigent criminal defendants. Consequently, even if the full force of Petitioners' position was granted the net result would be that certain classes of people might be allowed to play golf on the public course without the payment of a fee and it would not constitute a defense in this eminent domain proceeding.

The United States Supreme Court determined long ago that it was an appropriate public purpose to condemn land to provide parks. In *Via* v. *State Commission on Conservation, etc.,* 9 F. Supp. 556 affirmed 80 L. Ed. 388, the Trial Court held when the power of the State of Virginia was challenged in a condemnation proceeding initiated for the purpose of the establishment of Shenandoah National Park,

> ". . . that the power exists in any state for the promotion of the safety, convenience, welfare, and happiness of the people of that state. Conceding that the power of eminent domain must be exercised by a state only in connection with some public function of that state it must also be conceded that the furtherance of the health, pleasure and recreational facilities of its people is a function of the state."

Recreation of the citizenry is thus a legitimate aim of the state and the state in pursuing this aim caters to many diverse tastes: fishing, camping, mountain climbing, golf, tennis, swimming, bird watching, sailing, picnicking, etc. On occasion some or all of the costs of the furnishing of these activities are defrayed by the payment of a user's fee by any individual who shall avail himself of these benefits.

In none of these areas is anyone wholly excluded from recreation as such by reason of an inability to pay a fee in the same manner as they would be excluded from a vital public service as in *Boddie* v. *State of Connecticut* (No. 27, Oct. Term, 39 U. S. L. W. 4294), (access to a court which had a monopoly of the dissolution of the marriage relationship), *Griffin* v. *People,* 351 U. S. 12, 76 S. Ct. 585 (ability to participate in a state provided procedure to obtain review of a death sentence), or *Harper* v. *State Board of Elections,* 38 U. S. 663, 86 S. Ct. 1079 (ability to exercise the franchise).

Not only has the Supreme Court approved the condemnation of land by the State for recreational use but it has also approved the charging of fees for the use of publicly acquired or constructed and publicly maintained facilities. In *Huse* v. *Glover,* 119 U. S. 487, 30 L. Ed. 543 (1886) the Supreme Court sustained the power of the State of Illinois to construct locks and dams in the Illinois River for the purpose of improving its navigation and to prescribe reasonable rates of toll for passage of vessels through the locks. Counsel in that case did not have the ingenuity to urge that the tolls violated the equal protection clause because one

navigator might be less affluent than another navigator but his contention that the charging of tolls violated a provision of the Northwest Ordinance that "the navigable waters leading into the Mississippi . . . shall be common highways and forever free" was denied upon the grounds that such provision related only to the water ways in their natural condition.

Subsequent to *Huse* v. *Glover,* the U. S. Supreme Court decided *Sands* v. *Manistee River Improvement Co.,* 123 U. S. 288, 31 L. Ed. 149 and held that it was not a denial of due process for the State of Michigan to require that tolls be paid for the use of an improved waterway stating:

> "There is no taking of property from him, by such exaction within the prohibition, any more than there is a taking of property from a traveler, in requiring him to pay for his lodgings in a public inn. There is in such a transaction only an exchange of money for its supposed equivalent. The tolls exacted from the defendant and are merely compensation for benefits conferred, by which the floating of his logs down the stream was facilitated."

Similar conclusions were reached by the Supreme Court of Illinois with respect to fees charged by a city for the use of showers, dressing rooms, and lockers (*Carstens* v. *City of Wood River,* 344 Ill. 319, 176 N. E. 266) and a charge by the park district for mooring a yacht (*MacNeil* v. *Chicago Park District,* 401 Ill. 556, 82 N. E. 2d 452).

Petitioners, in accordance with long established procedures in eminent domain proceedings, have received a *quid pro quo* for the taking of their land for a purpose recognized long ago as legitimate by the Supreme Court of the United States. The proposed facilities are open to all without discrimination or classification by the State of Illinois or any state agency.

In *Boddie* v. *State of Connecticut* (Number 27, October Term, 1970, 39 L. W. 4294), this court expanded to some

extent upon the rationale of the *Griffin* case. Justice Douglas in warning and concurring, raised some question as how far the court might go. He stated:

> "The court today puts 'flesh' upon the due process clause by concluding that marriage and its dissolution are so important that an unhappy couple who are indigent should have access to the divorce courts free of charge. Fishing may be equally important to some communities. May an indigent be excluded if he does not obtain a license that requires payment of money which he does not have?"

There may be some resemblance between a fishing license case and a golf course case. We believe that this court has already decided by its reasoning as expressed in the *Boddie* case, in the *Griffin* case and in *Cohen* v. *Beneficial Finance Corp.*, 337 U. S. 541, 93 L. Ed. 1528, that the due process and equal protection clauses do not require that a public service for which a fee may be charged is required to be freely given to indigents unless such service relates to matters that are "of the very essence of a scheme of ordered liberty," and therefore this court should not take jurisdiction of every case where an even-handed statute encounters the existence of unequal external circumstances.

Respectfully submitted,

KEEHN LANDIS,
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111 West Monroe Street,
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RA 6-6130,

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Of Counsel.

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MAY 11 1971
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No. 1400

In the
Supreme Court of the United States
OCTOBER TERM, 1970

DROBNICK ET AL.,
Petitioners,

vs.

FOSS PARK DISTRICT, a Body Corporate and Politic,
Respondent, Condemnor.

PETITION FOR REHEARING

MARK J. DROBNICK, *pro se*
JOSEPH J. DROBNICK, *pro se*

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The Scheffer Press, Inc., 118 South Clinton Street, Chicago, Illinois

IN THE

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FOSS PARK DISTRICT, a Body Corporate and Politic,

Respondent, Condemnor.

PETITION FOR REHEARING

There are other substantial grounds available to the Petitioners which have not yet been presented to this Honorable Court. Therefore the Petitioners, MARK J. DROBNICK, *pro se,* and JOSEPH J. DROBNICK, *pro se,* pray that the order entered April 19th, 1971 denying the petition for writ of certiorari be revoked and further prays that the petition for the writ of certiorari be granted.

Massey v. *The United States,* 291 U.S. 608;
Sanitary Regrigerator Co. v. *Winters,* 280 U.S. 30;
Schriber v. *Cleveland Trust Co.,* 305 U.S. 47.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 1400

DROBNICK ET AL.,

Petitioners,

vs.

FOSS PARK DISTRICT, a Body Corporate and Politic,

Respondent, Condemnor.

REPLY BRIEF

ANSWER TO POINT I.

It takes One Million Dollars to construct a golf course, and it takes $150,000.00 per year to operate and maintain a golf course. This is big business. Jack Nicklaus makes $100,000.00 per year at the business of golf.

The State Appellate Court decision permits the taxation of homes for the purpose of acquisition of land, construction and maintenance of a golf course. Yet a home receives no benefit from a golf course. It is improper to use Tax Revenue for the construction, maintenance and operation of a golf course (9.1-6 Chapter 105, Ill. Rev. Statutes of 1969).

A Constitutional federal question has been ruled on by both the Trial Court and the Appellate Court as taxation of homes is permitted for the construction, operation and maintenance of a golf course.

ANSWER TO POINT II. AND POINT III (Part I)

The Petitioners for the Writ of Certiorari are real parties in interest. Joseph J. Drobnick, The Drobnick Realty Company and Mark J. Drobnick have all been served with summonses (See Page 73 and Page One of the Report of Proceedings).

The averments of the petition for condemnation as to the title of the Respondents, landowners, are binding on the condemnor, The Foss Park District. The Respondents, landowners are not duty bound to prove his or their title.

The Drobnicks are taxpayers in the Foss Park District. The Drobnick Realty Company was and still is a taxpayer of the Foss Park District. Joseph J. Drobnick is a Taxpayer of the Foss Park District. (See Tax Receipts Exhibit No. 1 attached hereto and made a part hereof).

Mark J. Drobnick is a taxpayer of the Foss Park District of lots and lands, and also of his residence at 1017 Wadsworth Avenue, North Chicago, Illinois. (See Tax Receipts Exhibit No. 2 attached hereto and made a part hereof).

ANSWER TO POINT III—(Part II)

Both the Appellate Court's decision and the Brief of the Foss Park District admit that in part tax funds are being used to acquire land, construct and maintain a golf course. Then the Foss Park District hopes to defray part of the costs of maintenance of the golf course by the payment of

a users' fee. The record before the Court is adequate for a determination to be made.

ANSWER TO POINT III—(Part III)

There is no resemblance between fishing and golf. I have never seen a million dollar fish and I hope I never see a million dollar fish. It takes a million dollars to construct a golf course, and it takes $150,000.00 per year to maintain it. Golf is big business. The industries that supply the golf sticks and golf bags, and the golf balls is also a million dollar business. Jack Nicklaus and others make $100,000.00 per year at the big business of golf.

Why should a small home owner, who works in a factory for his daily bread, supply the grounds for big business? The home owner derives no benefit from such taxation. All taxes on homes are based on the theory that some benefit is granted to the homeowner. Even special assessments are based on direct benefit to the home. A golf course gives no benefit to the home.

Respectfully submitted,

MARK DROBNICK, *Pro Se*

EXHIBIT NO. 1

REAL ESTATE TAX
FOR THE YEAR 1967
COUNTY OF LAKE • STATE OF ILLINOIS

BOOK	PARCEL NUMBER	TAX CODE	TAX RATE	EQUALIZED VALUE	TOTAL TAX DUE
1060	805	1009	4.198	660	27.72

		1st INSTALLMENT	2nd INSTALLMENT
NAME	J J DROBNICK 415 MADISON ST WAUKEGAN ILL 60085	13.86	13.86
		INTEREST	INTEREST
PROPERTY DESCRIPTION	CITY OF NORTH CHICAGO SOUTH WAUKEGAN	COST	COST
		TOTAL	TOTAL

SUB LOT OR SEC.	LOTS OR TWP.	BLOCK OR RANGE	ACRES	1st INST. DUE	2nd INST. DUE
	012	005	LOT	06/08/68	09/01/68

ENCLOSE THIS BILL WITH PAYMENT.

(OVER)

SEE REVERSE SIDE FOR RECEIPT OF PAYMENT.

WHY WAIT IN LINE? PAY YOUR TAXES BY MAIL!

1. **PENALTY DATE and INTEREST:** Payments due on or before due dates shown on front. Interest added at rate of 1% per month after penalty dates. 29¢ per lot and 51¢ per land description costs are added after advertising delinquent tax.
2. **SOMEBODY ELSE'S BILL:** If you have sold this real estate, kindly mail this bill to new owner.
3. **PAYMENT and RECEIPT:** Be sure to enclose this tax bill with your remittance to insure proper credit. Receipted bill will be returned to you as soon as your payment is recorded.
4. **N.S.F. CHECK:** Receipt void if payment is made by check which is not honored by bank. A charge of $2.00 will be made by the Collector for any check not honored by bank.
5. **NO TAX BILL:** Failure to receive tax bill will not relieve the tax payer of penalties accruing if taxes are not paid before penalty date.

PAYMENT RECEIVED 2ND INSTALLMENT

JUN 10-68 ISSUED 009122 PAID ****27.72

PAYMENT RECEIVED 1ST INSTALLMENT

EXHIBIT NO. 1

REAL ESTATE TAX

FOR THE YEAR 1967

COUNTY OF LAKE • STATE OF ILLINOIS

BOOK	PARCEL NUMBER	TAX CODE	TAX RATE	EQUALIZED VALUE	TOTAL TAX DUE
1060	804	10094	4.198	660	27.72

		1st INSTALLMENT	2nd INSTALLMENT
NAME	J J DROBNICK 415 MADISON ST WAUKEGAN ILL 60085	13.86	13.86
		INTEREST	INTEREST
PROPERTY DESCRIPTION	CITY OF NORTH CHICAGO SOUTH WAUKEGAN	COST	COST
		TOTAL	TOTAL

SUB LOT OR SEC.	LOTS OR TWP.	BLOCK OR RANGE	ACRES	1st INST. DUE	2nd INST. DUE
	011	005	LOT	06/08/68	09/01/68

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PAYMENT RECEIVED 2ND INSTALLMENT

JUN 10-68 PAID ISR 109121 ****27.72

PAYMENT RECEIVED 1ST INSTALLMENT

EXHIBIT NO. 2

REAL ESTATE TAX
FOR THE YEAR 1968
COUNTY OF LAKE • STATE OF ILLINOIS

BOOK	PARCEL NUMBER	TAX CODE	TAX RATE	EQUALIZED VALUE	TOTAL TAX DUE
945	1542	0901	4.911	6940	340.84

NAME	1st INSTALLMENT	2nd INSTALLMENT
MARK J. CROBNICK 415 MADISON ST. WAUKEGAN ILL. 60085	170.42	170.42
	INTEREST	INTEREST
PROPERTY DESCRIPTION: WAUKEGAN HIGHLANDS	COST	COST
	TOTAL	TOTAL

SUB LOT OR SEC.	LOTS OR TWP.	BLOCK OR RANGE	ACRES	1st INST. DUE	2nd INST. DUE
	008	003	LOT	06/02/69	09/02/69

ENCLOSE THIS BILL WITH PAYMENT.

(OVER)

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PAYMENT RECEIVED 2ND INSTALLMENT

PAID 9-1812 007****340.84 027 153

PAYMENT RECEIVED 1ST INSTALLMENT

EXHIBIT NO. 2

REAL ESTATE TAX
FOR THE YEAR 1968
COUNTY OF LAKE • STATE OF ILLINOIS

BOOK	PARCEL NUMBER	TAX CODE	TAX RATE	EQUALIZED VALUE	TOTAL TAX DUE
945	1541	0901	4.911	1700	83.50

NAME: MARK J. CROBNICK
415 MADISON ST.
WAUKEGAN ILL. 60085

1st INSTALLMENT	2nd INSTALLMENT
41.75	41.75
INTEREST	INTEREST
COST	COST
TOTAL	TOTAL

PROPERTY DESCRIPTION: WAUKEGAN HIGHLANDS

SUB LOT OR SEC.	LOTS OR TWP.	BLOCK OR RANGE	ACRES	1st INST. DUE	2nd INST. DUE
	007	003	LOT	06/02/69	09/02/69

ENCLOSE THIS BILL WITH PAYMENT.

(OVER)

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PAYMENT RECEIVED 2ND INSTALLMENT

OCT 15 68 PAID - 1812 008*****83.50

PAYMENT RECEIVED 1ST INSTALLMENT

AFFIDAVIT

State Of Illinois }
County Of Lake }

MARK J. DROBNICK being first duly sworn on oath deposes and says that the Petition for Rehearing is presented in good faith and not for delay, and the petition is restricted to the grounds above specified.

/s/ MARK DROBNICK
MARK DROBNICK
Lawyer
415 Madison St.
Waukegan, Illinois

Subscribed and sworn to before me
this 6th day of May, 1971.
/s/ Doris M. Moynihan
Notary Public.

(Seal)